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COMPARATIVE HEALTH SYSTEMS LAW & POLICY
(LAW726H1F)

Professor Colleen M. Flood

January 2010

University of Toronto

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COMPARATIVE HEALTH SYSTEMS LAW AND POLICY
(LAW726H1F)

Instructor: Colleen M. Flood, Faculty of Law, University of Toronto

Date	Time	Location
Wednesday, January 20	12:30-2:00	FLA
Thursday, January 21	8:20-10:20 AM	FA2
Friday, January 22	2:00-4:30	FLA
Monday, January 25	12:30-2:00	FLA
Tuesday, January 26	12:30-2:00	FLA
Wednesday, January 27	8:20-10:20 AM	FLA
Friday, January 29	9:00-12:00	FA2

COURSE OUTLINE

DAY 1: Wednesday, January 20: Welcome, Introduction, Resource Allocation Game.

- Introductions and Objectives and assignment of student roles for subsequent classes
- Resource Allocation Game
- Approaches to Comparative Health Law and Policy

Required Reading:

1. Michael J. Trebilcock, The Lessons and Limits of Law & Economics, Nov. 17, 2005 (extract, Part V).

2. "Provinces Ration Smaller Flu Vaccine Supply," *CBC News online* (30 October 2009). At: http://www.cbc.ca/health/story/2009/10/30/h1n1-canada.html (accessed 2 November 2009).

3. "Private-clinic patients jump the line for flu shot," *The Globe and Mail* (2 November 2 2009) A1.

4. T. Marmor, R. Freeman & K. Okma, "Comparative perspectives and policy learning in the world of health care" (2005) 7 *Journal of Comparative Policy Analysis* 331.

5. Timothy Jost, "Comparative and International Health Law" (2004) 14 *Health Matrix* 141.

Supplementary Readings:
Dana Lee Baker & Shannon Daily Stokes, "Comparative issue definition in public health: West Nile Virus, mad cow disease in blood products, and stem cell research" (2006) 8 Journal of Comparative Policy Analysis 1.

DAY 2: Thursday, January 21: An Overview of the U.S. and Canadian Health Care Systems

- 55 minutes- Presentation on the Canadian Health Care System
- 10 minute break
- 55 minutes - Generate the Top Ten Features of the Canadian Health Care System and Top Five Things that Need to Change (All Students). Discuss how the Canadian system compares with that of the US.

Required Reading:

1. Colleen M. Flood, "The Canadian System: A Health Law and Policy Perspective." (nb skim read the above paper – this will be covered in a class presentation)

2. Elizabeth Docteur, Hannes Suppanz & Jaejoon Woo, "The US Health System: An Assessment and Prospective Directions for Reform" *OECD Economics Department Working Paper No.350* (Paris: OECD) [abridged].

Supplementary Readings:
Barry R. Furrow *et al.*, "Health Care Cost and Access: The Policy Context" in *Health Law: Cases, Materials and Problems* (St. Paul MN: West Publishing Co., 2004) chapter 7.

Clyde Hertzman & Arjumand Siddiqi, "Tortoises 1, Hares 0: How Comparative Health Trends between Canada and the United States Support a Long-term View of Policy and Health" (2008) 4 *Healthcare Policy* 16.

C. Tuohy, *Accidental Logics: The Dynamics of Change in the Health Care Arena in the United States, Britain, and Canada* (Oxford: Oxford University Press, 1999).

Theodore R. and Antonia Maioni, *Health Care in Crisis: The Drive for Health Reform in Canada and the United States* (August 26, 2008). Available at SSRN: http://ssrn.com/abstract=1259253.

DAY 3: Friday, January 22: Economics and Distributive Justice in Health Services

- Presentation -- Economic and Justice Arguments
- Break-Out Groups -- Going Back to Basics – What sort of health care system should we have? What should it look like? What is the effect of politics and political economy on these choices?

Required Readings:

1. C.M Flood and G. Read, "Back to Basics: Arguments for Government Intervention in Health Care" [forthcoming]

2. P.M. Crosta, "Race Matters for Patients Awaiting Lung Transplants" *Medical News Today* (15 February 15 2008)

3. Gardiner Harris, "The Evidence Gap: British Balance Benefit vs. Cost of Latest Drugs" *The New York Times* (December 3, 2008) A1

Supplementary Reading:

A.J. Culyer, "The Normative Economics of Health Care Finance and Provision" (1989) 5 *Oxf. Rev. Econ. Policy* 881.

M. Trebilcock, "The Lessons and Limits of Law and Economics" (1997) 23 *Monash L.R.* 124.

David M. Cutler, "Equality, Efficiency, and Market Fundamentals: The Dynamics of International Medical-Care Reform" (2002) 40 *J. Econ. Lit.* 881.

N. Daniels, "Justice, Health and Healthcare" (2001) 1 *Am. J. Bioethics* 2.

DAY 4: Monday, January 25: Constitutional Challenges to Rationing Decisions in Health Care

- Mini-Debates: (Groups of between 6-7 to prepare debate on either side) –30 mins (other 2 groups prepare for debates tomorrow)
    a. *Chaoulli*: A Positive Force for Change or A Slippery Slope to a US System? – 45 mins.
    b. Constitutional Rights to Public Health Care – An Important Innovation or Judicial Intervention Gone Mad? – 45 mins.

Required Readings:

1. C.M. Flood, "Chaoulli's Legacy for the Future of Canadian Health Care Policy" (2006) *44 Osgoode Hall L.J.* 273. (abridged)

2. Stanley H. Hartt, "Arbitrariness, Randomness and the Principles of Fundamental Justice" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005)

3. Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *South African Journal of Human Rights* 383.

4. *Minister of Health and others v. Treatment Action Campaign and others* [2002] 5 S.Afr.L.R. 721 (S.Afr.Const.Ct)

Supplementary Readings:
S. Choudhry, "Worse than Lochner?" in C.M. Flood, K. Roach & L. Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005)

Abigail Alliance v. von Eschenbach No. 04-5350

Chaoulli v. Quebec (Attorney General), 2005 SCC 35 [edited version found as Appendix C to C. M. Flood, K. Roach & L. Sossin, eds., *Access to Care, Access to Justice: The*

Legal Debate Over Private Health Insurance in Canada (Toronto: University of Toronto Press, 2005)

Auton (Guardian ad litem of) v. British Columbia (Attorney General), 2004 SCC 78

DAY 5: Tuesday, January 26 - The Medicare Basket: how do we decide what to publicly fund? Can Administrative Law Help?

- Presentation on decision-making about determining the limits of public medicare: models from Oregon, Netherlands, New Zealand,
- Mini-Debates: (Groups of between 6-7 to prepare debate on either side) – Explicit Rationing - Necessary and Feasible or Explicit Rationing - A Mirage.
- Administrative Law can Improve Decision-Making about the Limits of Medicare vs. Administrative Law is Unlikely to improve Decision-Making–

Required Reading:

1. D. Callahan, "What is a Reasonable Demand on Health Care Resources: Designing a Basic Package of Benefits" (1992) 8 Jnl of Contemporary Health Law 1

2. L. Jacobs, T. Marmor & J. Oberlander, "The Oregon Health Plan and the Political Paradox of Rationing" (1999) 24:1 Jnl of Health Politics, Policy and Law 161

3. Colleen M. Flood "Conclusion" in Colleen M. Flood, ed., *Just Medicare* (Toronto: University of Toronto Press, expected February 2006)

4. *Flora v. Ontario Health Insurance Plan* (2007) CanLII 339 (ON S.C.D.C.)

5. *Shortland v. Northland Health Ltd* - [1998] 1 NZLR 433

DAY 6: Wednesday, January 27 - Legal Challenges to the Health Care Systems: World View

- Groups of 4 – provide and present to the entire class a précis of the system, how rationing works, the role of the courts, and what lessons are there for Canada from the system in question:

  England – 10 mins + 15 min discussion
  New Zealand – 10 mins + 15 min discussion
  South Africa – 10 mins + 15 min discussion
  United States – 10 mins + 15 min discussion

Required Reading:

1. Joanna Manning & Ron Paterson, "'Prioritization': Rationing Health Care in New Zealand" (2005) 33 Journal of Law, Medicine and Ethics 681

3. *R v. Cambridge District Health Authority ex parte B*, [1995] 1 FLR 1055

4. K. Syrett, "Rationing in the Courts: England" in *Law, Legitimacy and the Rationing of Health Care: A Contextual and Comparative Perspective,* (Cambridge: Cambridge University Press, 2007) c.6

5. K. Syrett, "Rationing in the Courts: South Africa" in *Law, Legitimacy and the Rationing of Health Care: A Contextual and Comparative Perspective,* (Cambridge: Cambridge University Press, 2007) c. 8

6. Michael T. Cahill & Peter D. Jacobson, "Pegram's Regress: A Missed Chance for Sensible Judicial Review of Managed Care Decisions" (2001) 27 AM. J.L. & Med. 421

7. Mark Steyn, "Unplugging Grandma isn't the Problem" *Orange County Register* (14 August 2009).

8. Sharon Begley, "Why Doctors Hate Science" *Newsweek* (9 March 2009).

Supplementary Reading:

C. Shalev & D. Chinitz, "Joe Public v. The General Public: The Role of the Courts in Israeli Health Care Policy" (2005) 33 J.L Med. & Ethics 651

DAY 7: Friday, January 29: The Role of Private Health Insurance in Different Health Care Systems and a Look at Funding Health Care apart from Through Taxation

- Groups of 3 or 4 – provide and present to the entire class a précis of the role of private health insurance and financing in the system in question, how it interacts with other sorts of financing, what function it fills in the system, and what lessons there are for Canada from the system in question:

  Netherlands – 15 mins + 15 discussion
  France – 15 mins + 15 disucssion
  Germany – 15 mins + 15 discussion
  England – 15 mins + 15 discussion
  Sweden – 15 mins + 15 discussion
  Canada – 15 mins + 15 discussion

Required Reading:

1. C.M. Flood & Amanda Haugan, "Is Canada Odd? A Comparison of European and Canadian Approaches to Choice and Regulation of the Public/Private Divide in Health Care" *Health Economics, Policy and Law* [forthcoming].

2. OECD Economic Survey of Health Care Systems (required only to read the description of the system you are asked to present on). At: http://www.oecd.org/findDocument/0,3354,en_2649_34587_1_119663_1_1_1,00.html

3. J. White, "American Medical Care: Comparative Lessons of and for It" in T. Marmor,

K. Okma and R. Freeman eds., *Comparative Perspectives and Policy Learning in the World of Health Care* (New Haven: Yale University Press, 2007).

4. Commonwealth Fund, *Health Policy Reform: Beyond the 2008 Elections, a resource for Journalist from the Commonwealth Fund*, online: <http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=671629>

Supplementary Readings:

F. Colombo, & N. Tapay, "Private health insurance in OECD countries: the benefits and costs for individuals and health systems", OECD Health Working Paper 15, 2004, online: <http://www.oecd.org/document/10/0,3343,en_2649_37407_33913226_1_1_1_1,00&&en-USS_01DBC.html>

S. Rathgeb Smith & M. Lipsky, "Privatization in Health and Human Services: A Critique" (1992) 17:2 Jnl. of Health Politics, Policy and Law 233.

Colleen M. Flood, Mark Stabile and Carolyn Tuohy, "How Does Private Finance Affect Public Health Care Systems: Marshalling the Evidence from OECD Nations" (2004) 29 Journal of Health Politics Policy and Law 359.

A. Gauthier, S.C. Schoenbaum & I. Weinbaum, *Towards A High Performance Health System for the United States* (Commonwealth Fund (March 2006), online: <http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=362744>

T. Jost, "The new governance, the open method of coordination and social health insurance in Europe" (2006) 7 Med. L. Int. 249-263

T. Jost, "Global Health Care Financing Law: A Useful Concept" (2008) 96 Geo. L.J. 41.

E. Mossialos, et al., eds., *Funding Health Care: Options for Europe* (Buckingham: Open University Press, 2002)

C. Normand, "Using social health insurance to meet health policy goals" (1999) 48 Soc. Sci. & Med. 865.

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DAY 1

1. Michael J. Trebilcock, "The Lessons and Limits of Law & Economics," Nov. 17, 2005 (extract, Part V).....1

2. "Provinces Ration Smaller Flu Vaccine Supply," *CBC News online* (30 October 2009). At: http://www.cbc.ca/health/story/2009/10/30/h1n1-canada.html (accessed 2 November 2009).....6

3. "Private-clinic patients jump the line for flu shot," *The Globe and Mail* (2 November 2 2009) A1.....9

4. T. Marmor, R. Freeman & K. Okma, "Comparative perspectives and policy learning in the world of health care" (2005) 7 *Journal of Comparative Policy Analysis* 331.....12

5. 5. Timothy Jost, "Comparative and International Health Law" (2004) 14 *Health Matrix* 141.....51

DAY 2

1. Colleen M. Flood, "The Canadian System: A Health Law and Policy Perspective." (nb skim read the above paper – this will be covered in a class presentation).....58

2. Elizabeth Docteur, Hannes Suppanz & Jaejoon Woo, "The US Health System: An Assessment and Prospective Directions for Reform" *OECD Economics Department Working Paper No.350* (Paris: OECD) [abridged].....148

DAY 3

1. C.M Flood and G. Read, "Back to Basics: Arguments for Government Intervention in Health Care" [forthcoming].....174

2. P.M. Crosta, "Race Matters for Patients Awaiting Lung Transplants" *Medical News Today* (15 February 15 2008).....204

3. Gardiner Harris, "The Evidence Gap: British Balance Benefit vs. Cost of Latest Drugs" *The New York Times* (December 3, 2008) A1.....206

DAY 4

1. C.M. Flood. "Chaoulli's Legacy for the Future of Canadian Health Care Policy" (2006) *44 Osgoode Hall L.J.* 273. [pages 300-307 omitted].....213

2. Stanley H. Hartt. "Arbitrariness, Randomness and the Principles of Fundamental Justice" in Colleen M. Flood. Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005).....243

3. Marius Pieterse, "Coming to Terms with Judicial Enforcement of Socio-Economic Rights" (2004) 20 *South African Journal of Human Rights* 383..... 252

4. *Minister of Health and others v. Treatment Action Campaign and others* [2002] 5 S.Afr.L.R. 721 (S.Afr.Const.Ct).....287

DAY 5

1. D. Callahan, "What is a Reasonable Demand on Health Care Resources: Designing a Basic Package of Benefits" (1992) 8 *Jnl of Contemporary Health Law* 1.....304

2. L. Jacobs. T. Marmor & J. Oberlander, "The Oregon Health Plan and the Political Paradox of Rationing" (1999) 24:1 Jnl of Health Politics, Policy and Law 161.....316

3. Colleen M. Flood "Conclusion" in Colleen M. Flood, ed., *Just Medicare* (Toronto: University of Toronto Press, expected February 2006).....336

4. *Flora v. Ontario Health Insurance Plan* (2007) CanLII 339 (ON S.C.D.C.).....343

5. *Shortland v. Northland Health Ltd* - [1998] 1 NZLR 433.....354

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1. Joanna Manning & Ron Paterson, "'Prioritization': Rationing Health Care in New Zealand" (2005) 33 Journal of Law, Medicine and Ethics 681.....369

2. *R v. Cambridge District Health Authority ex parte B*, [1995] 1 FLR 1055.....386

3. K. Syrett, "Rationing in the Courts: England" in *Law, Legitimacy and the Rationing of Health Care: A Contextual and Comparative Perspective,* (Cambridge: Cambridge University Press, 2007) c.6.....396

4. K. Syrett, "Rationing in the Courts: South Africa" in *Law, Legitimacy and the Rationing of Health Care: A Contextual and Comparative Perspective,* (Cambridge: Cambridge University Press, 2007) c. 8.....407

5 Michael T. Cahill & Peter D. Jacobson, "Pegram's Regress. A Missed Chance for Sensible Judicial Review of Managed Care Decisions" (2001) 27 AM. J L. & Med. 421 419

6. Mark Steyn, "Unplugging Grandma isn't the Problem" *Orange County Register* (14 August 2009) 437

7. Sharon Begley, "Why Doctors Hate Science" *Newsweek* (9 March 2009) 441

DAY 7

1. C.M. Flood & Amanda Haugan, "Is Canada Odd? A Comparison of European and Canadian Approaches to Choice and Regulation of the Public/Private Divide in Health Care" *Health Economics, Policy and Law* [forthcoming] 444

2. OECD Economic Survey of Health Care Systems (**required only to read the description of the system you are asked to present on**). At: http://www.oecd.org/findDocument/0,3354,en_2649_34587_1_119663_1_1_1,00.html

3. J. White, "American Medical Care: Comparative Lessons of and for It" in T. Marmor, K. Okma and R. Freeman eds., *Comparative Perspectives and Policy Learning in the World of Health Care* (New Haven: Yale University Press, 2007) 472

4. Commonwealth Fund, *Health Policy Reform: Beyond the 2008 Elections, a resource for Journalist from the Commonwealth Fund*, online: <http://www.commonwealthfund.org/publications/publications_show.htm?doc_id=671629> 516